United States Court of Appeals

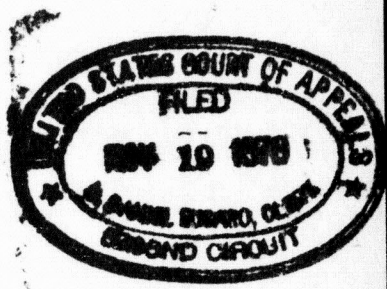
for the Second Circuit

BRIEF FOR APPELLANT

76-6150

United States Court of Appeals

FOR THE SECOND CIRCUIT



In the Matter of

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellee,

—against—

LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15 INTERNATIONAL UNION OF OPERATING ENGINEERS, THE IRON LEAGUE OF NEW YORK CITY, INC., THE CONSTRUCTION EQUIPMENT RENTAL ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK CITY, BUILDING CONTRACTORS' AND MASON BUILDERS' ASSOCIATION, THE CEMENT LEAGUE, STONE SETTING CONTRACTORS' ASSOCIATION, ALLIED BUILDING METAL INDUSTRIES, RIGGING CONTRACTORS ASSOCIATION, CONTRACTING PLASTERERS ASSOCIATION, EQUIPMENT SHOP EMPLOYERS,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC.

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BRIEF OF APPELLANT
The General Contractors Association of New York, Inc.

PRELIMINARY STATEMENT

On or about May of 1972, the United States of America (hereinafter the "U.S.A.") commenced an action against the above-identified defendants. One of the defendants appearing therein is identified as the General Contractors Association of New York City. This designation is improper in that the correct title for the defendant which appeared in this action is The General Contractors Association of New York, Inc. (hereinafter "GCA").

The GCA is a not-for-profit corporation created and existing under the Not-For-Profit-Corporation Law of the State of New York.

The GCA, in the Complaint served upon it by the U.S.A. was included in the action solely for the purposes of relief according to Rule 19a of the Federal Rules of Civil Procedure. During the course of the first few days of the trial of the action, the GCA together with the U.S.A. stipulated as follows:

> "It is stipulated by and between Plaintiff and Defendant, General Contractors Association of New York, Inc., (incorrectly designated herein as General Contractors Association of New York City) that Plaintiff's complaint does not assert any claim for liability against defendant General Contractors Association of New York, Inc.
>
> "It is further stipulated by and between Plaintiff and Defendant, General Contractors Association of New York, Inc., that, in the event of any proceeding for the purpose of establishing relief, on the basis of any judgment for liability in the trial herein, that in such a proceeding the General Contractors Association of New York, Inc. shall have a full opportunity to offer proof and defend against the allegations in the Complaint of Plaintiff that (1) the General Contractors Association of New York, Inc. is a proper defendant for purposes of relief under Rule 19(a) of the Federal Rules of Civil Procedure . . . ."

The above-recited stipulation was made part of the Pre-Trial Order. Said Order also had the following, as part thereof:

> "Defendant, The General Contractors Association of New York, Inc. (hereinafter, "GCA") contends that:
>
> (a) GCA is not an association of contractors engaged in industry affecting commerce within the meaning of 42 USC §2000e.
>
> (b) GCA has no collective bargaining agreements with the defendant unions.
>
> (c) GCA is not properly named as a defendant under Rule 19(a), Fed. R. Civ. P.
>
> (d) The action as against GCA should be dismissed in its entirety."

Upon the execution of the Pre-Trial Order, the GCA was excused by the District Court (Judge Tenney) from participating in the trial of the action inasmuch as the trial was to be restricted to the issue of liability only and no liability, as is evidenced by the above-recited stipulation, was asserted herein against the GCA.

After completion of the trial, this Court found Local 14 of the International Union of Operating Engineers Local 15 of the International Union of Operating Engineers guilty of discriminatory practices in failing to provide equal employment opportunities for non-whites (identified in the District Court's Order and Judgment as blacks and Hispanics) as required by the

applicable law. On or about September 1, 1976, the District Court issued a Final Order which contained many provisions therein binding the GCA, its officers, agents, employees and members notwithstanding that plaintiff made no claim of liability against GCA or its members and that its members were not parties to this action. In that respect, this Court's attention is directed to references to the provisions stated in the District Court's Order which deal with the GCA and/or its members, viz.

Paragraphs - 4 - 20 - 24 - 31 - 34(a) - 37(a) and (b) - 38 - 39(b) - 44(a) - 46 - 48 - 56(a) and (c) and 59.

As is stated above, in the Pre-Trial Order Stipulation, in part, it recites:

> "that, in the event of any proceeding for the purposes of establishing relief, on the basis for any judgment of liability on the trial herein, that in such a proceeding, the GCA of New York, Inc. shall have a full opportunity to offer proof and defend against the allegations in the Complaint of Plaintiff that (1) the GCA is a proper defendant for purposes of relief under Rule 19(a) of the Federal Rules of Civil Procedure. . . ."

Despite said stipulation, the GCA was never given a hearing before the Final Order herein of the District Court was issued.

What did occur was a meeting in the District Court, on July 26, 1976, with the Honorable Judge Charles Tenney, solely

for the purposes of reviewing the proposed Orders submitted by the Locals 14 and 15, the U.S.A. and GCA. At the outset of such review, the District Court (Judge Tenney) advised those present, it would use the form of proposed order submitted by the U.S.A. For a very brief time thereafter, the District Court solicited comments from those present, on the contents of the U.S.A.'s proposed order. However, after such brief period, the District Court elected to discuss only the comments it had, concerning the proposed order of the U.S.A. Thereafter, the District Court solely dealt with its comments with respect to the proposed Order; this approach consuming the morning session at said meeting.

At the conclusion of the morning session, the District Court announced that its review was all that the Court intended to have, with respect to the Government's proposed order and that there would be no consideration of any other orders. The District Court then suggested that the parties meet and attempt to see if an Order acceptable to all could be worked out among the parties. There ensued a discussion among Mr. Devorkin, representing the U.S.A. and the attorneys for Locals 14 and 15 and the attorney for GCA. Mr. Devorkin, the Assistant U.S.A. Attorney, advised the other attorneys present that all he would discuss was how he could improve upon his proposed Order. During the course of said discussion, it became apparent to all present in the court-room, including the District Court that no compromise was forth-

coming. At that point, the District Court ordered that all parties return at 2:00 o'clock in the afternoon for further review of the Government's proposed order.

At 2:00 o'clock that afternoon, the Court was reconvened and the District Court continued discussion on the Government's proposed Order until approximately 2:45 P.M., at which time it stated nothing further would be done on the Order and that the parties concerned, in the event they elected, could write a letter to the District Court setting forth their comments on the proposed Order as it had been revised that day.

GCA did, in fact, write such a comment letter to the District Court, dated July 30, 1976, consisting of five pages with copies to Mr. Robert Fisk, United States Attorney for the Southern District of New York, attention of Michael S. Devorkin, Richard O'Hara, Esq., attorney for Local 14, Robert Brady, Esq., attorney for Local 15 and Arthur C. Schupback, attorney for the Construction Equipment Rental Association.

In GCA's said letter, GCA requested that the letter become part of the record in the action. This letter contained certain comments of the GCA with respect to the Order as it affected the GCA and members of the GCA. Again, as recited hereinabove, the members of the GCA were never made parties to the action.

Thereafter, the District Court issued a Final Order and Judgment which was, in fact, the proposed order of the U.S.A. as revised by the District Court. There were no deletions therefrom of such provisions as dealt with the GCA and its members. Subsequent to the issuance of the Final Order and in the implementation of said Order, an Administrator for the Hiring Hall required pursuant to said Order was appointed. The collective bargaining agreements of the members of the GCA with Locals 14 and 15, make no provision for the use of a Hiring Hall.

The Administrator thereupon conducted many meetings with members of the Local Unions and their counsel, counsel of the Equal Employment Opportunity Commission and representatives of several of the defendants' contractors associations, including GCA. The GCA's participation therein, at the Administrator's convened meetings was stated to be on condition that such participation would not in any way prejudice, or be deemed a waiver of any rights of GCA, or its members had, or may and shall have in the matter. This was agreed to by the Administrator and counsel for the Equal Employment Opportunity Commission.

Thereafter, and again despite the fact that the members of the GCA had never been made parties to the action, nor in any way participated in the action, such members were compelled to comply with the Order of the District Court dated September 1, 1976. Further, the GCA was also bound by the Final Order of the

District Court of September 1, 1976, notwithstanding there was no proof that the GCA was properly joined in the action for purposes of relief according to Rule 19a of the Federal Rules of Civil Procedure. In fact, the GCA has no collective bargaining agreements with the defendant unions herein. The members of the GCA have collective bargaining agreements with the defendant unions but said members are not now, nor were they ever, parties to the within action.

The exhibits placed in evidence by the U.S.A. during the course of the trial, designated as Exhibits 40 A through E, 49 A through C, which are the collective bargaining agreements which establish that the GCA is not a party thereto and the fact that it is their members only, who are parties thereto.

Following the issuance of the Final Order and Judgment of this Court of September 1, 1976, Local 15 sought from this Court, a stay of the Order and the Judgment of this Court which was denied. Local 15 together with Local 14 also applied, to the United States Court of Appeals, Second Circuit, for a Stay of the September 1, 1976 Order and said applications were likewise denied. In the applications of Local 14 and 15 before the United States Court of Appeals, Second Circuit, the GCA submitted an affidavit therein setting forth it had no opposition to the relief therein sought by such applicants.

On November 10, 1976, the GCA sought an Order to Show Cause seeking from the District Court a "stay" pending a hearing as to the matter of relief as it related to the GCA. The District Court chose not to sign the Order and took the position that the matter was before the Court of Appeals.

POINT I

THE GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC. ("GCA") IS NOT A NECESSARY PARTY FOR THE PURPOSES OF RELIEF UNDER RULE 19(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The GCA is a Not-For-Profit Corporation created and existing under the laws of the State of New York. It is a legal entity separate and apart from its Contractor-Employer Members. In addition, the New York State Not-For-Profit Corporation Law, Section 517 "Liabilities of Members" provides, in part, as follows:

> "(a) The members of a corporation shall not be personally liable for the debts, liabilities or obligations of the Corporation. . . ."

The GCA does not have any collective bargaining agreements with the Union defendants, Locals 14 and 15 herein or with anyone else. The GCA does not employ any Members of the respective Unions, Locals 14 and 15. In that respect, the attention of this Court is directed to Plaintiff's Exhibits 40(A), (B), (C), (D) and (E) set forth on Pages 121 through Page 206, Joint Appendix Volume II: Exhibits. The items to which reference is made are collective bargaining agreements between Local 14 and 15 and the Employer Members of the GCA and GCA is not a party thereto.

In the case of Yonafsky against Wernick, 362 Federal Supplement 1005, the Court set forth three basic policy objectives fostered by Rule 19(a). They are as follows:

1. Avoidance of unnecessary or multiple litigation;
2. Providing complete relief for the parties before the Court;
3. Protection of the rights or interest of any absent parties.

GCA, as evidenced by the Record on Appeal herein, more specifically the collective bargaining agreements, Exhibits above identified, does not employ any members of the Unions concerned. The purpose of the within action is to provide equal employment opportunities for non-whites, in the industry, within the jurisdiction of Locals 14 and 15. In the Pre-Trial Order (See Joint Appendix Volume I: Pleadings - Page 42 therein) the Plaintiff, (then the United States of America) admitted there was no contention of liability for discriminatory employment practices being asserted, by the Plaintiff, against the GCA in the within action. The GCA was, immediately after the execution of the Pre-Trial Order, (which execution occurred on the second day of the hearing for liability) excused by the District Court from attendance at the hearing and did not participate therein, subsequently thereto.

In the Final Order and Judgment (See Joint Appendix

Volume I: Pleadings - Pages 239 et seq.) issued by the District Court on September 1, 1976, a reading thereof will disclose that there is no reference therein to the GCA as an Employer. The only provision in the Final Order and Judgment pertaining to the GCA is Paragraph 4 therein, i.e., one paragraph in 32 pages. Said Paragraph 4 does not contend GCA is an employer. In fact Paragraph 4 of the Final Order provides for a permanent injunction against the GCA and its members, not to act alone and/or in concert with others to the end discrimination in employment practices is effected even though no such charge was made against the GCA and its members in Plaintiff's Complaint, confirmed by the Pre-Trial Order Stipulation above-referenced. In fact, the last sentence of Paragraph 4 recites that said Paragraph does not constitute a finding that the GCA, its members and others have, in the past, engaged in the prohibited discriminatory acts or practices described therein.

Such paucity of reference in the Final Order and Judgment to the GCA, together with the uncontroverted fact GCA is not an employer of Locals 14 and 15 members and, in addition, the admission by Plaintiff of no charge against the GCA of liability for discriminatory employment practices, clearly establish the presence of the GCA in this action is not needed to avoid unnecessary or multiple litigation. Further, it is respectfully submitted, the paucity of reference to the GCA in the Final Order

in and of itself establishes the GCA is not a necessary party needed to provide total relief herein as set forth in the preceding paragraph herein. Paragraph 4 of the Final Order did not obligate the GCA to any affirmative action to be taken by the GCA, but merely permanently enjoined the GCA from violating the Final Order and Judgment by thereafter engaging in discriminatory employment practices, despite the fact in the actions and trial no charge of liability for discriminatory employment practices was asserted against the GCA.

Therefore, it cannot be reasonably contended that the objectives of the within action would be defeated and complete relief denied should the GCA be severed from the action.

As to the protection of the rights of any interested parties, there has been no finding and no proof submitted by the Plaintiff herein, that the parties before the District Court would be deprived of complete relief in the event that the GCA was stricken from this action.

With respect to the protection of the rights and interests of absent parties, this feature is one of the basic policy objectives fostered by Rule 19(a) of the Rules of Civil Procedure. However, there has been no proof thereof submitted by the Plaintiff, in this action, to establish that such absent parties' rights and interest would not be protected should the GCA be stricken from this action.

Further, and while Rule 19(a) and Rule 21 of the Federal Rules permits the District Court wide discretion in ordering the joinder of parties, it is respectfully submitted, under the facts as they pertain to the GCA, that misjoinder to be determined as being proper or not, must be accomplished with the requirements of due process. Moore v. Knowles, C. A. Texas 1973, 482 F.2d 1069 on remand 277 F. Supp. 302. No hearing was given to GCA by the District Court for the determination as to GCA being a necessary party herein. The GCA took exception to the District Court's method of determining relief without a hearing (see Joint Appendix Volume I: Pleadings Gallagher GCA Counsel) letter to Judge Tenney, July 30, 1976, Page 216 et seq.). The Record herein establishes, therefore, that whether the joinder of GCA as a necessary party, was proper or not, it was not accomplished with the requirements of due process.

The Court's attention is respectfully directed to Boles v. Greenville (1972) 468 Federal Reporter, 2d, 476, wherein it was held there was nothing to preclude this Court from passing upon the question as to GCA being a necessary party under Rule 19(a).

POINT II

THE DISTRICT COURT IN FASHIONING RELIEF DENIED TO THE MEMBERS OF THE GCA DUE PROCESS AND ABUSED ITS RIGHT OF DISCRETION IN ORDERING HIRING PROCEDURES BINDING UPON THE GCA MEMBERS WHEN SUCH MEMBERS WERE NOT PARTIES TO THE ACTION AND WERE NEVER SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT.

In Point I the fact that the GCA, a Not-For-Profit-Corporation,and its members are separate and distinct legal entities is stated. Also in Point I - the New York-Not-For-Profit-Corporation Law is, in part, quoted as to the fact that members of a New York-Not-For-Profit Corporations are not ". . . personally liable for the debts, liabilities, or obligations of the Corporation. . . ."

This Point pursues and deals with the position of the Contractor-Employer Members of the GCA with respect to what has transpired in the actions herein.

"It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights in personam of parties not brought before it by due process of law," Pennoyer v. Neff, 95 U.S. 714, 24 L.ed. 565 and that "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction does not constitute due process of law" Ibid p. 565.

The "members" of the GCA were not served or made parties to this action and this point was clearly pressed by the Attorney for the United States of America, Mr. Devorkin when he stated the following at page 61 of the July 26, 1976 meeting: (see Joint Appendix, Volume I: Pages 128-203).

> "Mr. Devorkin: If it were necessary to seek a judgment of liability against the contractors, we are prepared to do that. We proved at the trial acquiescence and practice have the same effect. If we had to get a judgment of liability against the contractors we would be prepared to go through depositions and discovery and a trial for that purpose, but I don't think it is necessary. They are not being held financially accountable for anything that has happened here. They are just being equitably ordered to insure that the Union -- that this Order works, to follow the terms of the Order. They are an integral part of the industry and it is necessary to do that."

There can be no doubt that the GCA Member-Contractors were not within the jurisdiction of the District Court. In spite of their nonparty status, however, the District Court took the position of deeply committing the GCA Member-Contractors to definite affirmative responsibilities concerning the manner in which they were to engage the union members into their employment.

Examples of the commitment which the trial court mandated upon the nonparty contractors are found throughout the Final Order and Judgment. (See Joint Appendix Volume I: Pages 239-271) At page 3 (pg.241 of Joint Appendix, pleadings) thereof the court said:

"4. The defendant contractor associations, their officers, agents and employees, MEMBERS and successors, and all persons in active concert or participation with them, are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating in recruitment, selection, training, etc." [emphasis added]

Due Process cannot be denied in fixing, by judgment, against one beyond the jurisdiction of the court. Riverside Mills v. Menefee, 237 U.S. 189, 59 L. ed. 910. The trial court herein did not have jurisdiction over the GCA Member-Contractors and it therefore could not render a judgment specifically mandating or enjoining such unnamed parties.

Again, at page 12 of the Final Order and Judgment, the District Court included the GCA Member-Contractors within its relief by stating that:

"20. The UNION CONTRACTORS, using forms approved by the Administrator, shall provide to any requesting employee a certification of the number of days and type of work performed by that individual." [emphasis added]

Thus, the District Court mandated conduct on the part of the GCA Member-Contractors without a hearing, creating an atmosphere which is repugnant to the due process clause of the Constitution.

The District Court committed the GCA Member-Contractors to a further mandate again at page 15 of the Final Order and Judgment by stating that:

"31. No member of any Union shall seek or receive work directly from any CONTRACTING EMPLOYER." [emphasis added]

The affirmative commitment exercised on the GCA Member-Contractors forced upon them the hiring hall mandate of paragraph 30 of the Final Order and Judgment which stated that:

"30. The Unions shall jointly operate a single Hiring Hall, and one Master Eligibility List and a joint Hiring Hall sheet, as hereinafter defined, and all members of any Union shall receive job referrals from the Unions only from these lists."

Reading these two above-mentioned paragraphs [30, 31] together, one must take note that the GCA Member-Contractors were deprived of their right of direct access to union members.

The District Court did not stop its exercise of non-jurisdictional mandates at this point but continued to express responsibilities concerning GCA Member-Contractors at page 23 of the Final Order and Judgment wherein it stated at paragraphs 37 and 38:

"TRANSFERS

"37. (a) UNION CONTRACTORS are permitted to to transfer workmen from job site to job site without the men registering in the Hiring Hall as long as there is no break in the continuity of the employment of such men. If any workman is laid off by a UNION CONTRACTOR for more than three days, he is required to register for referral at the Union Hiring Hall in order to obtain further employment. [emphasis added]

(b) The UNION CONTRACTORS shall keep an appropriate record of each transfer pursuant to subparagraph (a) on forms promulgated by the Administrator. These records shall be available for inspection by the E.E.O.C. and the Administrator. [emphasis added]

LAYOFFS

38. No workman shall be laid off until all workmen at his job performing work of a similar nature who commenced work subsequent to him have been laid off. Nothing in this paragraph shall derogate from the right of an employer to layoff workmen for cause. Any non-white workman who challenges the basis of his layoff under this Order shall notify the Administrator in writing within three (3) days of such layoff, setting forth his reasons for regarding the layoff as improper. The workman shall simultaneiously send copies of said notice to the Union and his employer."

Again at page 30 of the Final Order and Judgment the court said:

"H. GENERAL PROVISIONS

56. (a) Within 60 days of the date of this Order the Unions and ALL MEMBERS OF THE CONTRACTOR ASSOCIATIONS shall permanently post conspicuous notices, in Spanish and English, in form, language and locations approved by the Administrator, at the Unions' offices and Hiring Hall, all job sites and each contracting employer's principal place of business, advising individuals of their rights under this Order." [emphasis added]

And finally at page 31 the court stated that:

"(c) The Unions and ALL MEMBERS OF THE CONTRACTORS ASSOCIATIONS shall keep available

for inspection at the Unions' offices and Hiring Hall and each contracting employer's principal place of business, a copy of this Order." [emphasis added]

Collectively, those parts of the Final Order and Judgment, which relate directly to the GCA Member - Contractors, and over whom the District Court had no jurisdiction, enjoins and directs those members as deeply and significantly as Locals 14 and 15, against whom liability was found to exist, and over whom the court did have jurisdiction.

The District Court, by way of the Final Order and Judgment, expanded its jurisdiction to an entity with which it had no right to rule upon. The case of U.S. v. Olympia Shipping Corporation, 11 F.2d 600 clearly spoke to this issue when it said that a court cannot, by rendering a judgment covering an entire transaction, indirectly adjudicate that part of it to which it has determined it has no in personam jurisdiction. The GCA Member - Contractors were not parties to this action and the District Court was aware of this before it issued its Final Order and Judgment and thereby it abused its discretion.

The mandates of the "Hiring Hall" and other provisions stated above were a deprivation of the GCA Member - Contractors rights without due process of law. The Courts have

addressed this issue on many occasions when they state the general rule that where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void, not voidable. U.S. Valley v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S. Ct. 116, Brogdex Co. v. Food Machinery Co., 92 F.2d 787, 789. No court can judicially function without having jurisdiction of parties whose rights it is assuming to adjudicate and against whom its judgment or decree is to be enforced.

Having been denied Due Process of Law, assured to them by the Constitution of the United States of America, this Court should find that the Contractor - Employer - Members of the GCA should not be bound, in any respect, directly and/or indirectly, by the District Court's Final Order and Judgment. As a concomitant thereof (but not the sole concomitant) this Court should find that the Contractor - Employer - Members are free to hire employees, as they did prior to the issuance of the District Court Order and Final Judgment, including but not limited to the right to directly employ members of the Unions without proceeding through the Hiring Hall, so long as such hiring is based upon non-discriminating hiring practices.

POINT III

THE PROVISION OF THE ORDER AND JUDGMENT REQUIRING THE ESTABLISHMENT OF A "HIRING HALL" IS IMPROPER AND CONSTITUTES AN ABSENCE OF DISCRETION ON THE FOLLOWING GROUNDS:

(a) The remedy of a "hiring hall" constitutes the addition of a substantive provision to existing collective bargaining agreements between the Unions and the GCA Members-Employers-Contractors.

(b) The contractors, signatories to such collective bargaining agreements, are not parties in this action.

(c) The contractors, members of GCA, were thereby deprived of their constitutional and contractual rights without being accorded a hearing.

(a) THE REMEDY OF A "HIRING HALL".

The collective bargaining agreements between the Unions herein and the employing contractors who are members of GCA (See Joint Appendix Volume II: Exhibits 40-49 and 54 Pages 121 through 206, 278 through 335 and Pages 347 through 434) do not contain any provision for a "Hiring Hall" as a source of recruiting or supplying needed personnel. In fact, there is no provision in such agreements concerning the method of hiring.

The Final Order and Judgment mandates that the contractors (non-parties herein) members of GCA must hire operating engineers solely from a "hiring hall".

The effect of this mandate is that the District Court has added a substantial substantive provision to the collective bargaining agreements, a provision that was never agreed to by the parties thereto and thus constitutes a deprivation by the Court of the right and freedom of the contractor members of GCA to bargain collectively.

A fundamental policy of the National Labor Relations Act is the freedom to bargain. Admittedly, it is not an absolute right; Congress has imposed some limitations such as provisions relating to closed shops and the prohibitions found in 29 U.S.C. 15(e). However, it is established federal labor policy that the National Labor Relations Board or the courts may not compel the inclusion of a substantive term in the collective bargaining agreement. H. K. Porter Company v. NLRB, 397 U.S. 99. The role of the agency and indeed the courts is to supervise the procedures of bargaining and not to regulate the substantive aspects of bargaining.

The obvious reaction to this contention of course would be that Title VII proceedings are sui generis and the remedial aspects or limitations of the National Labor Relations Act are not applicable to Title VII proceedings.

There are some decisions which would seem, absent analysis, to support a distinction. For example, a Court of Appeals has stated that a court would not hesitate to reform a collective

bargaining agreement that produced a discriminatory effect. Bing v. Roadway Express, 485 F.2d 441. Similarly in Vogler v. McCarty, 451 F.2d 1236, the court revised the seniority system and stated that it would not be inhibited by the fact that a prior seniority system had been established in a collective bargaining agreement.

All of the above Court interferences with collective bargaining agreements dealt solely with revisions of some aspects of existing discriminatory seniority systems in such collective bargaining agreements.

The Supreme Court in Franks v. Bowman Transportation Co., 47 L. Ed. 2d 444 dealt with a similar question, namely the grant of retroactive seniority to discriminatees. The Court in approving such retroactive grant of seniority noted that this did not result in a departure from established Federal Labor Policy. In fact, the Court noted that the remedial section of the National Labor Relations Act (NLRA) was the model for the remedial section of Title VII legislation. Under the NLRA if a person was discriminately refused employment, the order of employment would include seniority from the date of the discriminatory refusal to hire. The reasoning being that to effectuate the purposes of the NLRA the remedial order should create the conditions and relationship that would have existed had there been no unfair labor practice. Franks v. Bowman, supra.

The mandate of a "Hiring Hall" herein contravenes the holding in H. K. Porter Company, supra and goes far beyond the holding of Franks v. Bowman, supra. Here we do not have a mere readjustment of discriminatory seniority but an imposition by a Court of a new substantive provision in a collective bargaining agreement where no allegation, or proof of any discriminatory provision in such agreements have been submitted to the Court and, further, the employer-contractors were not parties to the action.

Appellant GCA acknowledges that in correcting discriminatory practices a court has the power, if not the duty, to issue a decree which will, as far as is possible, eliminate the effects of past as well as future discrimination. But this discretionary power is not unfettered. Clearly, it does not give use to a power to impose new substantive terms upon a negotiated collective bargaining agreement. If Title VII remedies are, as acknowledged by the Supreme Court, modeled upon the remedial sections of the NLRA should not the District Court follow the precedent and procedures of the National Labor Relations Board? In Local Union No. 12, United Rubber Workers, 368 F.2d 12, the Board's order, as enforced by the Court of Appeals, directed the union (where as here the employer was not a party), to propose to the employer contractual provisions designed to prohibit the continuation of racial discrimination in terms and conditions of employment.

In brief the mandate of a "Hiring Hall" herein violates the holding of H. K. Porter, supra, and appears at odds with principle enunciated in Franks v. Bowman, supra that Title VII remedies are modeled on the remedial sections of the NLRA.

The District Court made no effort to pursue this approach; the District Court even failed to hold a hearing or obtain in any fashion the views of GCA as to the effect of such a mandate on the efficient and safe operations of the member contractors of GCA, although such a hearing was provided for in the Pretrial Order. Certainly where the existence of discriminatory practices is established, they should be rooted out and the remedies granted by the Court should be designed to accomplish this. However, the drastic remedy provided here should not be countenanced unless the record establishes that there is no alternative. It is respectfully submitted that the absence of hearings on the remedy of hiring hall clearly demonstrates that alternatives or the safety concerns of the contractors were not considered in that there was no opportunity to inform the Court of such concerns or to consider alternatives.

(b) THE CONTRACTORS (MEMBERS OF GCA) SIGNATORIES TO THE SUBJECT COLLECTIVE BARGAINING AGREEMENT ARE NOT PARTIES IN THIS ACTION.

Assuming arguendo that it was not an abuse of discretion for the District Court to impose a hiring hall upon a collective

bargaining agreement, it would seem a clear abuse of discretion to impose such a term where a signatory to such an agreement is not a party to the action before the District Court.

It has been noted previously that GCA, a party in this action, is not a party to or signatory to the subject collective bargaining agreements. Only the members of the GCA association, are parties' signatories. It would seem to be a basic elemental concept that if a contract is to be reformed by a court that both parties to the contract to be reformed be subject to the Court's jurisdiction and be before the court.

The simple uncontravertable fact is that the plaintiff failed to make the employing contractors parties to this action.

(c) THE MEMBER CONTRACTORS OF GCA WERE THEREBY DEPRIVED OF THEIR CONSTITUTIONAL AND CONTRACTUAL RIGHTS WITHOUT BEING ACCORDED A HEARING.

The Pretrial Order herein provided that GCA would be accorded a hearing on the relief or remedy to be provided and the District Court seemed to recognize the need therefor in the meeting on July 26, 1976. (See Joint Appendix Volume I: Pleadings etc.).

The prejudicial effect of such denial is apparent from the fact that the Final Order and Judgment makes no provision for the employing contractor to be a party to, or even have a voice

in the procedures for the assuring that referred applicants have the competence to perform the work. In the event that the referred applicant is unable to operate a 200 ft. boom crane and causes injury to the public or co-employees is the plaintiff or the administrator herein bound to indemnify the contractor?

The GCA and its members have been denied the opportunity to present evidence on these vital issues. Such a hearing should be directed as a minimum.

The mandate of a hiring hall should be stricken, or in the alternative, should therefore be stayed pending a hearing on the need for such a mandate and consideration of reasonable alternatives.

POINT IV

THE DISTRICT COURT IN FASHIONING THE RELIEF HEREIN,WITHOUT ACCORDING ANY HEARINGS ON THE MATTER OF RELIEF AS THE SUBJECT RELATED TO GCA, IN DISREGARD TO THE STIPULATION ENTERED INTO WHICH PROMISED SUCH A HEARING, ABUSED ITS DISCRETION AND DENIED TO GCA ITS CONSTITUTIONAL RIGHT OF DUE PROCESS

Section (g) of 42 U.S.C. 2000e-5 allows the Federal District Court wide latitude within its "Enforcement Provision" to prevent unlawful practices; however, there can be no doubt that at all times there must be a balance between the individual interests sought to be protected by the Constitutional right of Due Process and the interest of the EEOC and those persons so affected by discriminatory practices.

The Civil Rights Acts and the developments of the EEOC were born out of the necessity of protecting fundamental Constitutional rights of all Americans, and were not so born as to sacrifice the fundamental right of Due Process.

The Final Order and Judgment of the District Court herein, failed entirely to recognize the Constitutional rights of the GCA, but in its stead arbitrarily deprived GCA of its right of Due Process by not conducting a hearing as to the matter of relief.

"Relief is the judicial means or method for enforcing a right or redressing a wrong, and the basic ideology of jurisprudence indicates that such proceedings are 'ex parte' when relief is granted without an opportunity for persons against whom the relief is sought to be heard." "A party to an action has the right to be present at the trial thereof, so that it is improper to proceed to trial in the absence of a party who is not represented."

The District Court chose not to conduct a hearing on the matter of relief and by so doing it attacked the very stipulation entered into by and among the parties herein. On September 9, 1974 a Pre-Trial Order (see Joint Appendix: Volume I, Pleadings Page 31) was issued which in part stipulated at page 11 thereof (Page 43 of the Joint Appendix: Volume I, Pleadings) that:

"It is further stipulated by and between Plaintiff and Defendant, General Contractors Association of New York, Inc., that, in the event of any proceeding for the purpose of establishing relief, on the basis of any judgment for liability in the trial herein, that in such a proceeding the General Contractors Association of New York, Inc. shall have a full opportunity to offer proof and defend against the allegations in the Complaint of Plaintiff that (1) the General Contractors Association of New York, Inc. is a proper defendant for purposes of relief under Rule 19(a) of the Federal Rules of Civil Procedure."

The above stipulation followed an additional stipulation at the same page wherein the United States Government said that its complaint asserted no claim of liability against the GCA:

"It is stipulated by and between Plaintiff and Defendant, General Contractors Association of New York, Inc., (incorrectly designated herein as General Contractors Association of New York City) that Plaintiff's complaint does not assert any claim for liability against defendant General Contractors Association of New York, Inc."

At page 5 of the Complaint, (see Joint Appendix Volume I, Pleadings, pages 7-15, specifically page 11) the Government went so far as to indicate very clearly that GCA

was included as a named defendant for the purpose of relief only pursuant to Rule 19(a) of the Federal Rules.

The transcript of the meeting held on July 26, 1976 indicates that the District Court saw the need for a hearing so as to be able to frame a remedy which would redress the wrongs found to exist during the trial on the issue of liability. At page 29 of the transcript of the July 26th meeting, the District Court said in response to Mr. Devorkin:

> "The Court: All right, we are going ahead. I said I will take a look at the Order and maybe we will have to set this thing down for trial on possible practices by the contractors* over the past years which would warrant injunctive relief. So I would be prepared, if I were you, to have at least some possible further hearing." [Joint Appendix, Vol. 1, pages 128-203]

No further hearing was had in relationship to the District Court's perusal. However, the Court stated at that same meeting, at page 61 (see Joint Appendix, Volume I, Pleadings page 187) of the transcript thereof, that it did

*"Contractors-employees" of GCA not parties to action.

not know whether GCA did discriminate. Without ever conducting a hearing as to that fundamental point, the District Court arbitrarily issued its Final Order and Judgment, which included GCA within its relief provisions, including in such provision a permanent injunction against the GCA prohibiting it from engaging in discriminatory employment practices, etc. even though no claim of liability was ever asserted by the Plaintiff against the GCA.

The District Court was clearly illogical and inconsistent in the posture it reflected in the Order and Judgment. When you realize that on July 26th it stated at the meeting, at page 41 of the transcript, that:

> "The Court: Maybe we should have some hearings about the contractors* and what they are doing." [Joint Appendix, Vol. 1, pages 128-203, specifically page 168]

Clearly, at this point, the facts were not fully present before the Court; the Court knew it and in spite of that fact, it chose to bypass GCA's fundamental right of Due

*"Contractors-employees" of GCA not parties to action.

Process and frame its remedy without any proof of entitlement being presented to the Court by Plaintiff and no hearing provided wherein the GCA could have its day in Court to defend against the provisions of the Order affecting the GCA.

A careful review of the record and especially the July 26th transcript establishes the District Court's failure of consideration of the matter of due process as it relates to relief against the GCA.

In Riverside Mills v. Monefee, 237 U.S. 189, 59 L. ed. 910, the Court said that whenever a provision of the Constitution is applicable, the duty to enforce it is all embracing and imperative. A proceeding which is adversarial demands confrontation and the right of Due Process cannot be tossed aside in the name of expediency.

An opportunity for a hearing is one of the essential elements of Due Process, Shields v. Utah Idaho C.R. Co., 305 U.S. 177, 83 L. ed. 111, which includes that "no man should be punished without an opportunity of being heard", Hovey v. Elliot, 167 U.S. 409, 42 L. ed. 215. Without a full hearing

as to issues of both liability and relief, there exists a fundamental violation of Due Process of law, Goltra v. Weeks, 271 U.S. 536, 70 L. ed. 1071, Holmes v. Conway, 241 U.S. 264, 60 L. ed. 1211.

The District Court, because it failed to hear testimony as to the form of relief, may have created a situation where the very lives of the workmen (as well as the general public) it sought to protect are endangered in that they are now forced to work in areas of extreme high risk caused by the refusal of the District Court to hold hearings so as to preclude the possibility of having inexperienced, unskilled operators attempting to control sophisticated and dangerous equipment found within the jurisdiction of Locals 14 and 15.

In an effort to erase discriminatory practices, the District Court is mandating a situation which threatens the very life of each workman and every pedestrian who walks both within and about construction sites.

The District Court failed to realize that large cranes require prolonged periods of experience before one is capable of safely operating them within small areas found throughout the metropolitan area. Even the most unsophisticated equipment requires in its operation precise application

of skills when digging within narrow trenches in and about underground gas lines and other dangerous utilities.

One can understand the District Court's desire for a speedy remedy, where liability has been found, but here the District Court has acted without informed consideration of adequate training programs and careful screening procedures to insure that whomever operates the machinery is qualified and competent.

The lack of a hearing as to the matter of relief without knowledgeable consideration of the safety aspects involved in the implementation of the Final Order and Judgment, precluded GCA from presenting testimony as to the nature of the risks involved in the operation of all the equipment covered by the Final Order and Judgment herein. The need to adopt procedures to ensure competent operators is not evident within the Final Order and Judgment.

The Final Order and Judgment, in its present form, will allow unskilled operators behind the controls of sophisticated and costly construction equipment and when used by such

unskilled operators, such equipment will thereupon become a dangerous weapon creating a highly hazardous condition to the general public and workmen in the area.

In light of the gravity of the matter and to avoid such irreparable harm, it is respectfully submitted that the implementation of the Final Order and Judgment should be stayed and that the Constitutionally assured Due Process of the law be followed so that GCA can be given the opportunity to be heard.

POINT V

THE GCA NOT BEING A NECESSARY PARTY UNDER RULE 19a OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE SEVERED FROM THE ACTION AND NOT BOUND IN ANY WAY BY THE DISTRICT COURT FINAL JUDGMENT AND ORDER. THE MEMBERS OF THE GCA; NOT BEING PARTIES TO THE ACTION SHOULD NOT BE BOUND IN ANY WAY BY THE DISTRICT COURT'S FINAL ORDER AND JUDGMENT AND SHOULD BE FREE TO OBTAIN THEIR EMPLOYEES AS THEY DID PRIOR TO THE ISSUANCE OF THE DISTRICT COURT'S ORDER AND NOT BE REQUIRED TO SEEK EMPLOYEES THROUGH A HIRING HALL

Respectfully submitted,

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STATE OF NEW YORK)
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YVONNE BORNHOLZ, being duly sworn, deposes and says: that deponent is in the employ of SHEA GOULD CLIMENKO & CASEY, attorneys for Appellant General Contractors Association of New York, Inc. herein, is over 18 years of age, is not a party to this action and resides at 81 Chestnut Avenue, North Pelham, New York. On the 19th day of November, 1976, deponent served the within Appellant, General Contractors Association of New York, Inc.'s Brief on the following:

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by depositing a true and correct copy of the same, properly enclosed in a postpaid wrapper in the official depository maintained and exclusively controlled by the United States Govenment at 330 Madison Avenue, New York, New York 10017 that being the post office address of the attorneys for Appellant, General Contractors Association of New York, Inc., directed to said attorneys above-listed

at the abovementioned addresses designated by them for that purpose.

Yvonne Bornholz

YVONNE BORNHOLZ

Sworn to before me this

19th day of November, 1976

Catherine A. Graham

CATHERINE A. GRAHAM
Notary Public, State of New York
No. 24-1523330 Qual. in Kings Co.
Commission Expires March 30, 1977

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